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88-2079

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner,

vs.

REGINALD MAHAFFEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Whether the majority of the Illinois Supreme Court failed to follow this Court's interpretation of the Confrontation Clause by holding that *Lee v. Illinois* and *Cruz v. New York* require automatic reversal of respondent's conviction upon a finding that a non-testifying co-defendant's confession was inadmissible as substantive evidence and refusing to engage in a harmless error analysis as mandated by this Court in *Schneble v. Florida* and *Harrington v. California.*

Whether any confrontation clause error would have been considered harmless, if a harmless error analysis had been done, where respondent confessed to committing and/or intending to commit every crime charged in the indictments (except the one for which he was found not guilty), where respondent was positively identified by the only surviving victim as one of the murderers, where the physical and scientific evidence substantially corroborated respondent's confession, where respondent possessed numerous items of the victims' personal property when arrested and where the record affirmatively demonstrated that *this* jury *did* follow the court's instructions not to consider the co-defendant's confession against respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, which was entered on April 20, 1989.

OPINION BELOW

The opinion of the Supreme Court of Illinois, to be published as The People of the State of Illinois, appellee v. Jerry Mahaffey, appellant—The People of the State of Illinois, appellee v. Reginald Mahaffey, appellant, is reproduced as Appendix A to this Petition.

JURISDICTION

The opinion, order and judgment of the Supreme Court of Illinois were entered on April 20, 1989. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The decision of the Illinois Supreme Court was explicitly based on federal constitutional law, in particular on the confrontation clause of the sixth amendment as applied to the States through the fourteenth amendment and the decisions of this Court in *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) and *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides, in part, that

> "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

On August 29, 1983, in the early morning hours, Dean and Jo Ellen Pueschel were murdered in their home and their 11-year-old son, Rickey, survived the attempt to take his life. Rickey testified at trial that while sleeping that night, he found himself awakened in a headlock position. Two different voices were saying "shut up" and "be cool." He tried to scream, but a hand blocked his nose. It was difficult to breathe and he was either hit or fell back to sleep. (R. 2386-2387) Rickey awoke again, walked to the kitchen in a daze, saw his mother being held by one man, while another man walked through the back door. Rickey and his mother were forced to lie down in the dining room on their stomachs. Rickey saw his mom crying while she was being hit and then he did not remember what happened. He either fell asleep or was struck. (R. 2387, 2390, 2451) He awoke about 8:20 a.m., saw his father lying dead on the floor in his parents' bedroom, saw his mother lying dead on the floor in the dining room and walked outside in a daze. (R. 2388-2389) His grandfather drove up and Rickey said, "My mom and dad are dead." (R. 2235) Joseph Heinrich found his daughter lying in a pool of blood in the dining room and phoned police. Rickey was transported by ambulance to the hospital.

Detective Anthony Graffeo arrived at 2519 West Jerome in Chicago at about 9:30 a.m. He entered the kitchen through the back door and found a bloody bat with the name "Reggie Jackson" inscribed on it. He found Jo Ellen Pueschel in the dining room lying face down with a pool of blood under her head. Dean Pueschel was found lying on the floor in the bedroom; he had been battered about the head and there were numerous puncture wounds on

his side. Next to him was an empty gun holster. The Detective found a bloody baseball bat with "Ted Simmons" inscribed on it, a pellet gun under the bed, two empty cases for rifles and shotguns, and a box for a hand gun; a jewelry box and dresser drawers were pulled out. (R. 2258-2268)

On September 2, 1983, Sergeant Byrne and Detective Grunhard responded to a radio call to meet Sergeant Jackson who had Cedric Mahaffey seated in a squad car. Cedric told them he knew who committed the double murder on the north side of Chicago a couple of days earlier. He would not initially give the names to the officers until he could be sure of their involvement and he inquired if any guns had been stolen. After Sergeant Byrne verified that guns had been stolen, Cedric stated that he knew that they were a .357 magnum, a 12 gauge shotgun and a .30 caliber rifle. (R. 2717-2721) Cedric accompanied the officers and pointed out the apartments where the guns and the defendants could be found. Cedric reluctantly told the officers that the men who committed the double murder were his brothers, Reginald and Jerry Mahaffey. (R. 2722)

Upon Reginald Mahaffey's arrest, a partially loaded .357 magnum revolver was found on the nightstand next to where he had been lying. (R. 2539-2540) The blood on the gun was subsequently determined to be the same type as Jo Ellen Pueschel (R. 2818), and the gun was identified as having belonged to Dean Pueschel. Numerous items of jewelry and other personal property from the Pueschel apartment along with a Remington Winchester, Model 870 shotgun were also recovered from respondent's apartment. All items were identified, in court, as belonging to the Pueschels. Upon the arrest of Jerry Mahaffey, numerous

items of the Pueschel's personal property were also recovered and identified as belonging to the Pueschels.

Reginald Mahaffey personally removed a man's ring from his finger, a man's watch and a yellow chain with a crucifix from his pocket, stating "You might as well take these too, because they belong with all that stuff." (R. 2598) All were identified as belonging to Dean Pueschel.

Both defendants gave oral as well as written confessions within a few hours of their arrests. (Appendices B and C) Motions to quash arrest and suppress statements were denied by the trial court. Both defendants claimed their confessions were coerced and involuntary. Both defendants moved to sever their cases and both motions were denied; the trial court holding that the confessions interlocked under *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), and that the defenses of the defendants were complimentary and not antagonistic. Each defendant's confession was admitted into evidence with specific limiting instructions to consider the confession only against the defendant who made it and that each defendant had a right to have his guilt or innocence determined individually. (R. 2987, 3723)

Reginald Mahaffey's 23 page typed court-reported statement included his admission to attempting to murder 11-year-old Rickey by smothering and choking him and ordering his brother, Jerry, to stab the boy when he would not stop struggling. He admitted to clubbing Dean Pueschel over the head with a baseball bat taken from Rickey's bedroom. He admitted to raping Jo Ellen Pueschel in both the kitchen and the living room of her home. Reginald admitted to stealing numerous items of personal property and guns from the Pueschel apartment. Reginald admitted to ordering Jo Ellen and her son to

lie down on the floor and he admitted to beating Jo Ellen on the head with the .357 Magnum pistol which he had in his possession at the time of his arrest. Reginald admitted that just prior to beating Jo Ellen, he and Jerry had a conversation in which they agreed "to kill this bitch too." Reginald thought that as he was leaving the Pueschel home his brother was "finishing the lady and her son off with the bats," but he was not sure. (Appendix B-14)

Reginald Mahaffey testified on his own behalf. Jerry Mahaffey did not testify. Reginald denied killing Dean and Jo Ellen Pueschel, denied beating Rickey and claimed he was never at 2519 W. Jerome. (R. 3655-3666) Respondent claimed to have bought the Pueschel's personal property from a man he did not know who came to his apartment looking for his roommate, Morriell Redmond. Reginald claimed to have purchased the guns to protect his brothers and sisters and nieces and nephews. (R. 3693-3694)

Respondent further testified that all the police officers as well as the Assistant State's Attorney were liars (R. 3684) and claimed that the photograph taken of him after his court-reported confession was a fake and produced by trick cameras. (R. 3689-3690) Reginald admitted doing the talking during his court-reported statement but claimed he memorized what to say from what Sergeant Byrne told him. (R. 3691-3692)

In rebuttal, the People offered certified copies of conviction for attempt burglary and robbery. (R. 3714) Defendant had been sentenced in 1981 to 4 years in the Penitentiary.

Jerry Mahaffey's defense was the same as Reginald's; the confession was the result of police brutality. Defense

counsel argued that the Assistant State's Attorney was not called in by police officers to take the statements, "until they got those two men where they wanted them, in a police station, with a story down pat." (R. 3838-3839)

The jury found each defendant guilty of the murder of Dean Pueschel, the murder of his wife, Jo Ellen Pueschel, the attempt murder and aggravated battery of their 11 year old son Rickey, home invasion, rape, armed robbery, theft and residential burglary. Respondent, Reginald Mahaffey was found not guilty of deviate sexual assault.

The same jury found each defendant eligible for the death penalty based on two aggravating factors:

1.) the defendant had been convicted of murdering two or more individuals and the deaths were the result of either an intent to kill more than one person or of separate premeditated acts;

2.) the murdered individual was killed by the defendant and not by another party to the crime or simply as a consequence of the crime, intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm, and the murdered individual was killed during the course of one of the following felonies: armed robbery, rape, home invasion or residential burglary. (R. 4270-4271, R.C. 141-142)

The jury also found no mitigating factors sufficient to preclude imposition of the death penalty.

At the death penalty hearing, the People presented evidence that on March 23, 1984, while awaiting trial on the charges in the case at bar, Reginald Mahaffey held Officer Vernon Williams of the Cook County jail at gunpoint, as he and five other inmates attempted to escape. Reginald Mahaffey beat a lieutenant and threatened to kill Officer Williams. (R. 4023-4025) He twice hit Captain Hunt

on the side of the head, stuck a gun in another Officer's mouth and threatened to kill that officer if the doors were not opened. (R. 4006-4010) Respondent finally surrendered when he was surrounded, but Jerry Mahaffey did escape, only to be apprehended a few days later.

When the trial court imposed sentences upon Reginald Mahaffey, he stated:

> In all my experience, I have never run across a case in which the facts were so brutal, so heinous, so wanton. I suppose I have read about things that have been more brutal than this event, but I myself have never run into anything that would match this cold, calculating terror. (R. 4305-4306)

On direct appeal to the Illinois Supreme Court, the convictions and sentence of death as to Jerry Mahaffey were unanimously affirmed. By a five to two vote, Reginald Mahaffey's conviction and sentence were reversed and remanded for a new trial.

The majority opinion held that the co-defendant's confession did not bear sufficient indicia of reliability to be admissible as substantive evidence against respondent under *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 214 (1986), and under *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987) limiting instructions do not cure this defect. The majority further held that respondent's inability to cross-examine the co-defendant regarding whether or not his confession was voluntary or coerced undercut respondent's claim of coercion and was therefore not harmless. In sum, the majority held that the violation of the Sixth Amendment Confrontation Clause was not harmless because of the inability to cross-examine or confront the witness.

The dissenting Justices rejected this circuitous *per se* rule and relying on *Schneble v. Florida*, 405 U.S. 427, 92

S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), and *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) held that what is required by a reviewing court when a *Bruton* error has been committed is

> [c]onsideration of the strength of the competent evidence of the defendant's guilt and the probable effect on the jury of the nontestifying co-defendant's confession. (Appendix A-42)

The dissenting Justices found that the overwhelming evidence of Reginald Mahaffey's guilt rendered any *Bruton* error harmless beyond a reasonable doubt.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE CIRCULAR REASONING OF THE MAJORITY OF THE ILLINOIS SUPREME COURT WHICH HELD THAT A SIXTH AMENDMENT VIOLATION CANNOT BE HARMLESS BECAUSE OF THE INABILITY TO CROSS-EXAMINE A NON-TESTIFYING CO-DEFENDANT WHOSE STATEMENT WAS ADMITTED INTO EVIDENCE WITH LIMITING INSTRUCTIONS, IGNORES THE MANDATE OF THIS COURT IN *SCHNEBLE v. FLORIDA* AND *HARRINGTON v. CALIFORNIA*, AND IS A COMPLETE MISINTERPRETATION OF *LEE v. ILLINOIS* AND *CRUZ v. NEW YORK*.

Since *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), this Court has consistently made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."

United States v. Hastings, 461 U.S. 499, 509, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 961 (1983). This Court specifically held in *Schneble v. Florida*, 405 U.S. 427, 430, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972), that

> The mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), does not hold otherwise. In fact, this Court in *Cruz* reiterated the holding in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), that the defendant's confession may be considered on appeal in assessing whether any Confrontation Clause violation was harmless. *Cruz*, 107 S.Ct. at 1719. That judgment must be based on the Court's own reading of the record and a determination of whether the State's case would have been "significantly less persuasive" absent the confession of the co-defendant. *Schneble v. Florida, supra*, 405 U.S. at 432; *Harrington v. California, supra*, 395 U.S. at 254.

Nevertheless, the majority opinion of the Illinois Supreme Court refused to follow this Court's interpretation of the Confrontation Clause. The majority held that since the co-defendant's confession did not bear sufficient indicia of reliability to be admissible as substantive evidence against respondent, respondent's inability to cross-examine the co-defendant was automatically reversible error. The Illinois Supreme Court cited *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), but

failed to note that *Lee* was remanded to the Appellate Court of Illinois, Fifth Judicial Circuit to assess the evidence in the entire case to determine whether the Confrontation Clause error was harmless.[1]

As the dissenting Illinois Supreme Court Justices in the case at bar pointedly stated, the majority failed to consider "the strength of the competent evidence of defendant's guilt and the probable effect on the jury of the nontestifying co-defendant's confession." (Appendix A-42) The majority held that the Confrontation Clause error could not be harmless because, as the co-defendant did not testify, "Reginald could not cross-examine him as to whether his confession was coerced or involuntary. Therefore, Reginald's claim of coercion was undercut by his inability to confront Jerry regarding the accusations contained in his statement." (Appendix A-19) In essence, the majority opinion is circuitous and boils down to the following conclusion:

> The confrontation clause violation was not harmless because there was a confrontation clause violation.

The circular reasoning expressed by the majority results in a *per se* rule compelling reversal which flies in the face of every decision of this Court since *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 26 L.Ed.2d 476 (1968). As the dissenting Justices noted, "*Bruton* errors, though

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[1] In *People v. Lee*, 164 Ill. App. 3d 155, 164 N.E.2d 628 (5th Dist. 1987), the Appellate Court held that with respect to the murder of Mattie Darden, the admission of the co-defendant's confession against defendant Lee was harmless beyond a reasonable doubt. With respect to the murder of Odessa Harris, the court held that the admission of the confession did contribute to the verdict.

constitutional in nature, do not mechanically compel reversal." (Appendix A-42)

The failure to follow the dictates of this Court is most egregious in the case at bar since respondent's own confession to the commission of and the intent to commit every crime charged (except deviate sexual assault) was corroborated by the plethora of physical evidence recovered from the respondent and from his apartment, from the scene of the murders, from scientific evidence, as well as respondent's positive identification as one of the murderers by the only surviving victim of the defendants' brutal rampage.

The efficacy of the Sixth Amendment and the cause of justice are not advanced by the application of a *per se* rule where it is further apparent that in this particular case, the jury *did* follow the court's extensive limiting instructions, thus abrogating the danger both *Bruton* and *Cruz* addressed. (See Point II, *infra*.)

II.

WHERE THE RECORD DEMONSTRATES THAT RESPONDENT'S JURY *DID* FOLLOW THE COURT'S EXTENSIVE LIMITING INSTRUCTIONS, WHERE THE RESPONDENT CONFESSED TO COMMITTING AND/OR INTENDING TO COMMIT EVERY CRIME CHARGED IN THE INDICTMENTS, EXCEPT THE CRIME FOR WHICH HE WAS FOUND NOT GUILTY, WHERE RESPONDENT WAS POSITIVELY IDENTIFIED BY THE 11-YEAR-OLD SURVIVING VICTIM AS THE MURDERER OF HIS PARENTS, WHERE THE PHYSICAL AND SCIENTIFIC EVIDENCE CORROBORATED RESPONDENT'S CONFESSION IN ALMOST EVERY DETAIL, AND WHERE RESPONDENT POSSESSED NUMEROUS ITEMS OF THE VICTIMS' PERSONAL PROPERTY WHEN ARRESTED, ANY ERROR WOULD HAVE BEEN CONSIDERED HARMLESS, AS THE DISSENTING JUSTICES SO HELD, HAD A HARMLESS ERROR ANALYSIS BEEN DONE.

In *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) this Court held:

> Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. *Id.* 405 U.S. at 432.

In the case at bar, no truly reasonable possibility exists that Reginald Mahaffey would have been acquitted of the two murders, attempt murder, rape, residential burglary, armed robbery, aggravated battery, theft or home invasion absent the confession of Jerry Mahaffey. The confession of Reginald Mahaffey constitutes a complete admission to committing or being accountable for the commission of as well as the intent to commit each crime charged in the indictments. The testimony of the surviving victim, Rickey Pueschel, almost exactly parallels Reginald Mahaffey's confession in addition to Rickey's in-court identification of defendant as one of his parents' murderers. The physical evidence recovered from defendant,

the murder scene as well as the other testimonial, tangible and scientific evidence admitted at trial was so overwhelmingly consistent and corroborative of respondent's confession that the introduction into evidence of the co-defendant's confession could not possibly have contributed or been a material factor in the jury's verdict.

In both *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1986), and *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), this Court proceeded on the assumption that the juries involved in those cases disregarded limiting instructions and utilized hearsay declarations as substantive evidence. In *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987), this Court noted the "overwhelming probability" of a jury's inability to follow instructions in those types of cases. In the case at bar, however, that "overwhelming probability" was rebutted.

The jury was instructed on numerous occasions to consider each defendant's confession only against the defendant who made the confession. The only crime to which respondent did not confess to either committing or intending to commit was that of deviate sexual assault upon Jo Ellen Peuschel.[2] There was no other testimonial, tangible or scientific evidence admitted at trial to prove that this crime was committed by respondent. The *only* evidence came from the co-defendant's confession which stated that Reginald "had his dick in her mouth." (Appendix C-7) The jury followed the court's instructions by

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[2] The indictment charged that respondent committed the offense of deviate sexual assault in that by force or threat of force Jo Ellen Pueschel was compelled to perform an act of deviate sexual conduct to wit: oral copulation upon respondent in violation of Ill. Rev. Stat. 1981, Ch. 38, §11-3(a).

disregarding the co-defendant's statement and found Reginald not guilty of deviate sexual assault, thus demonstrating that in this case, the overwhelming probability is that the jury *did* follow the court's instructions not to consider the co-defendant's confession against respondent.

Initially, respondent's confession described an intent to burglarize a store, which turned out to be unsuitable for burglarizing, and the fortuitous inability to leave the area because the battery in the van respondent and his brother were driving had died. The defendants walked through the parking lot, came to some apartment buildings and noticed an open window. Reginald removed the screen and both defendants entered the Pueschel apartment. (R. 2902-2903) Reginald stated, "We hit the bathroom first." (Appendix B-6)

At trial, Detective Anthony Graffeo testified that on the ground outside the bathroom window of the Pueschel apartment were the bathroom screen and three plastic shampoo bottles. (R. 2275-2277)

Reginald stated that he picked up a butcher knife in the kitchen, which was about five inches in length, and then both he and his brother entered the "kid's room." (Appendix B-6) The child was lying on his stomach and Reginald stated he got on the boy's back, held a pillow on his head and choked the boy. The child was kicking and "after we struggled with the boy for probably four minutes I told my brother to stab him," and according to Reginald, his brother followed his instructions. (Appendix B-7) Discovering a box of baseball bats in Rickey's room, Reginald claimed his brother also hit the boy over the head a couple of times with one of the bats. (Appendix B-8)

Rickey Pueschel testified at trial that on the night of the murders he was awakened in his bed and found him-

self in a headlock position. He heard two different voices, it was difficult to breathe and he was either hit or he fell back to sleep. (R. 2386-2387) He had been choked. Dr. Aguilera testified that Rickey had a large hematoma around the left eye, a large cut on the left side of the head, skull fracture and multiple stab wounds in Rickey's back and upper chest. (R. 2857-2861)

Reginald explained that he and his brother then proceeded to the other bedroom where Dean and Jo Ellen Pueschel were sleeping. Each brother stood on either side of the bed and simultaneously clubbed Dean Pueschel on the head with baseball bats taken from Rickey's bedroom.

According to Dr. Edward Donaghue, Dean Pueschel's body exhibited deep lacerations of the scalp extending down to the skull, multiple skull fractures, hemorrhages, and multiple pieces pushed below the level of the remaining skull. (R. 3081-3084) The injuries were consistent with being struck by a blunt instrument such as a baseball bat. (R. 3089)

Reginald then related that he took Jo Ellen Pueschel into the kitchen and had sexual intercourse with her, took her into the living room and again had vaginal intercourse with her over the arm of the couch. (Appendix B-9) Reginald was interrupted by Jerry who emerged from the bedroom and explained that Dean Pueschel had a .357 magnum pistol. (Appendix B-10) When Reginald again entered the bedroom, Dean Pueschel was lying on the floor and Reginald proceeded to take jewelry from a jewelry box on the dresser and one of Dean's T-shirts from the dresser drawer. (Appendix B-10)

Detective Graffeo discovered Dean Pueschel on the bedroom floor, battered about the head and bloody. There were numerous puncture wounds on his side. Next to him was an empty gun holster, bloodstains on the bed and a bloody

baseball bat with "Ted Simmons" inscribed on it; a jewelry box and dresser drawers were pulled out. (R. 2266-2268)

Rickey identified the "Ted Simmons" bat as one of his baseball bats which he kept in his room. (R. 2392-2393) The blood found on the "Ted Simmons" bat had type O(n) blood on it; the same as Dean Peuschel. (R. 2804-2806, 3344) No fingerprints were found on the baseball bats.

Respondent's confession related how Jo Ellen Peuschel put on a brown trench coat, took respondent to her car and turned off the car alarm. Reginald then packed a T.V., a tape machine player, an arcade game and a case of tapes into the car along with a rifle, a shotgun, a .357 magnum, a box of 30/30 shells, 2 boxes of 12 gauge shells, a box of .38 special and a box of .357 mags. (Appendix B-11-12) Reginald kept the jewelry in his pocket.

Sergeant Byrne observed Detective Grunhard recover from the back bedroom closet where Reginald was arrested, a stereo dust cover containing 24 pieces of jewelry. (R. 2542) From the nightstand next to where defendant was found hiding, a box of .30 caliber bullets was recovered and from a dresser, a box of 12 gauge shotgun shells was found. (R. 2543) Detective Grunhard also removed a Remington Winchester, model 870 shotgun from a shelf in the bedroom closet as well as three 12 gauge shotgun shells. (R. 2543) Among the jewelry items recovered were a bracelet with the name Rickey inscribed on it, a bracelet with the name of Jo Ellen inscribed thereon and another bracelet with a charm bearing the name of Jo Ellen on it. (R. 2563-2568)

In his confession, Reginald identified all of these items as having been taken by him from the Pueschel apartment on the night of the murders. He further identified the items that were recovered from Jerry Mahaffey's apart-

ment. In court, the guns were identified by Jo Ellen's brother as belonging to Dean Pueschel. (R. 2470-2473)

When respondent was arrested, he told Sergeant Byrne, "You might as well take these too," (R. 2598) and he removed a man's ring from his hand, a man's Seiko watch and a yellow chain with a crucifix attached from his pocket. (R. 2597) In court, Jo Ellen's mother identified these items as having belonged to Dean. (R. 2778-2779)

Respondent's confession then related what he did when he returned to the apartment.

> My brother told me, 'hey, man, we have to kill this bitch too.'
>
> Q. What did you say?
>
> A. 'Man,' I whispered, 'I know, man, don't make her panic, you know.' (Appendix B-13)

Reginald stated, "I told her to lay down and her son mumbled, 'Mom, lay down, just lay down, mom,' something like that." Jo Ellen tried to say something to her son and that is when Reginald hit her in the head with the .357 pistol; her son laying next to her on the floor. The discussion between Reginald and Jerry to murder Jo Ellen "too" occurred just prior to respondent's beating Jo Ellen in the head with the .357 pistol. (Appendix B-13-14)

Rickey Pueschel testified at trial, that when he awoke again, he walked to the kitchen in a daze, saw his mother being held by one man, while another walked through the back door. Rickey testified that he and his mother were forced to lie down on the floor on their stomachs. Rickey saw his mom crying while being hit and then he did not remember what happened. He either fell asleep or was struck. (R. 2387, 2390, 2451)

At trial, Rickey testified, "Yes, I had a pretty good glance at them when I was in—when I walked into the kitchen and saw my mother and the two men." (R. 2394) Rickey identified both Jerry Mahaffey and Reginald Mahaffey, in court, as the two men he saw on the night of his parents' murders. (R. 2394)

Detective Graffeo found Jo Ellen Pueschel lying face down with a pool of blood under her head. Her head was obviously battered, the skin was split on the top and her eye was swollen. (R. 2261) Lying on the floor between the living room and the dining room was a dark brown ladies' trenchcoat. (R. 2333-2334)

Dr. Edward Donaghue discovered large deep lacerations of the scalp that extended down to the skull on the right side of her head, the back of the head toward the top and the back of the head in the middle. There was bleeding over the entire surface of the brain, several hemorrhages, swelling of the brain and skull fractures. (R. 3066) Dr. Donoghue determined that Jo Ellen died from craniocerebral injuries to the skull and brain. (R. 3075)

The partially loaded .357 magnum revolver found on the nightstand next to where Reginald Mahaffey had been lying when arrested had red stains which appeared to be blood. (R. 2539-2540) The blood was subsequently determined to be the same type as Jo Ellen Pueschel. (R. 2818) The .357 magnum was identified by Jo Ellen's brother as having belonged to Dean Pueschel. (R. 2476)

The majority opinion of the Illinois Supreme Court misstates the evidence with regard to Reginald's confession by stating, "Finally, Reginald stated that Jerry hit the woman on the head with a baseball bat as she lay on the kitchen floor." (Appendix A-18) In fact, respondent stated that as he was leaving he heard "solid hits," but stated,

"That's the thought I had. I didn't know for sure, I only thought that." (Appendix B-14) He did *not* state that Jerry did, in fact, hit Jo Ellen with a baseball bat. Nevertheless, it should be noted that the "Reggie Jackson" bat discovered by Detective Graffeo on the washing machine in the kitchen had type B(n) blood on it, the same as Jo Ellen. (R. 2258, 2344, 2804, 2811-2812, 3343)

Respondent then explained how he and his brother took the loaded up Pueschel car, dropped off the Pueschel's belongings and abandoned the car, "hoping that somebody else would rip off the car where they would discover fingerprints I may have left that would be no good." (Appendix B-14-15) He did try to wipe off fingerprints with a T-shirt.

Sergeant Frank Piercynski had previously discovered the Pueschel's car exactly where defendant stated that he and his brother abandoned it. (R. 2494-2495)

When shown a photograph of the Pueschel family by Assistant State's Attorney Miller respondent stated:

A. Yes, I recognize those people.

Q. Who are those people in this photograph?

A. Those are my victims. (Appendix B-17)

Also admitted as substantive evidence against Reginald Mahaffey was the testimony of Sergeant Byrne and his conversation with Cedric Mahaffey. (The admission of this testimony was not raised as an issue on appeal, nor would there have been a basis for doing so.)

Cedric Mahaffey told the officers that he knew who committed the double murders on the north side of Chicago. (R. 2718) He stated that a .357 mangum, a 12 gauge shotgun and a .30 caliber carbine rifle had been taken from

the apartment of the murder victims. (R. 2721) At first he did not want to reveal the names of the two men involved, but subsequently told Sergeant Byrne that they were his brothers, Reginald and Jerry. (R. 2722) Cedric had told the officers that the victims were beaten and that the boy was beaten and stabbed. (R. 2735) Cedric's information came from what his brothers had told him. (R. 2740) He also told Sergeant Byrne that he did not want to testify against his brothers and he would not do so. (R. 2722)

Cedric had been told that his brothers intended to commit a burglary on the north side of Chicago. The van they had borrowed broke down. Seeing an open window, they crawled through, finding a boy asleep. The defendants beat and stabbed the boy. They then went to another room and upon finding a man and a woman, beat them. The defendants removed items from the house and had sex with the woman. The defendants took a car from the victims and drove to the west side of Chicago. (R. 2749)

This evidence substantially corroborated Reginald's confession on significant details. Although Cedric did not specify which brother committed which particular act, it is clear that Jerry and Reginald were acting in complete concert with one another. Under Illinois law, each was equally guilty for all crimes committed. (Ill. Rev. Stat. 1981, ch. 38, sec. 5-2(c)).

What is abundantly clear is that respondent's own confession contains all of the elements necessary to prove each and every crime charged under Illinois law. Respondent admitted to clubbing, choking and attempting to smother Rickey Pueschel and he admitted to ordering his brother to stab the boy, thus clearly being responsible as well as accountable (see Ill. Rev. Stat. 1981, ch. 38, sec. 5-2(c)) for the attempt murder of Rickey.

Respondent admitted to beating Jo Ellen Pueschel with the .357 magnum, which he possessed at the time of his arrest, and agreeing with his brother that she was to be killed. Respondent's pistol beating alone clearly could have been the cause of Jo Ellen's death, but any further action taken by his brother was specifically agreed to by respondent.

Respondent admitted to clubbing Dean Pueschel with a baseball bat. According to medical testimony, the cause of death was multiple stab wounds with craniocerebral injuries to the skull and brain as a significant contributing condition. (R. 3089) It is true that respondent did not admit to stabbing Dean Pueschel or even knowing that his brother may have stabbed him. However, he admitted that the agreed upon intent was in fact, to kill the victims when he responded, "I know man," when his brother said, "we have to kill this bitch, *too.*" (emphasis added) Respondent's actions alone were also a significant contributing factor in the cause of death of Dean Pueschel.

It is readily apparent that the co-defendant's confession added nothing to the case against Reginald Mahaffey, except to state that Reginald rather than Jerry stabbed the boy. Yet, Reginald admitted that stabbing the boy was certainly what he intended since the child would not stop struggling. Jerry also stated Reginald stabbed Dean Pueschel four or five times, yet Reginald admitted in his confession that the murder of the victims was the agreed upon plan. There was simply no defense under Illinois law in the body of Reginald's confession which was either refuted or placed into question by the co-defendant's confession, a significant factor in the case of *Lee v. Illinois*, 476 U.S. 530, 103 S.Ct. 2056, 90 L.Ed.2d 514 (1986), not present in the case at bar. In his brief on direct appeal to the Illinois Supreme Court, respondent conceded that the confessions of the defendants "matched" and "inter-

locked" in all "essential respects." (Deft. Br. No. 61822 in the Illinois Supreme Court, p. 60).

Respondent's guilt for committing all crimes charged, except deviate sexual assault, was plainly apparent from the record on appeal. The jury in this case clearly did follow the trial court's limiting instructions not to consider the co-defendant's confession in determining respondent's guilt. Had the majority of the Illinois Supreme Court followed the mandates of this Court and not pronounced a *per se* rule by its circular reasoning, respondent's convictions would have and should have been affirmed since any constitutional error was, at most, harmless. There is no reasonable possibility that the co-defendant's confession contributed to the convictions of Reginald Mahaffey.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and opinion of the Illinois Supreme Court.

Respectfully submitted,

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